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Supreme Court, U.S.
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No. 94-2083

In the Supreme Court of the United States

OCTOBER TERM, 1995

TIMOTHY L. STERN, PETITIONER

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioner's application for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412, without opinion but apparently because the government's position was substantially justified.

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OPINIONS BELOW

The order of the court of appeals denying the motion for attorney's fees (Pet. App. A) is unreported. The opinion of the court of appeals on the merits of the case (Pet. App. B1009-B1015) is reported at 14 F.3d 148.

JURISDICTION

The order of the court of appeals was entered on March 20, 1995. The petition for a writ of certiorari was filed on June 16, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a doctor certified to practice acupuncture, operated a pain clinic in Rochester, New York, through which he provided services to patients who were eligible for Medicare benefits. C.A. App. 64. Medicare is administered by the Department of Health and Human Services (HHS) which, through contractors, processes, determines, and pays claims for covered services. 42 U.S.C. 1395u (1988 & Supp. V 1993); 42 C.F.R. 421.200-421.210. Medicare covers only services that are "reasonable and necessary." 42 U.S.C. 1395y(a) (1988 & Supp. V 1993). Acupuncture services are generally excluded under this standard. C.A. App. 15.

2. An administrative investigation determined that petitioner provided non-reimbursable acupuncture and electro-acupuncture pain treatments to Medicare patients and then submitted claims to Medicare on their behalf in which the treatments were described as "nerve blocks," a reimbursable procedure. C.A. App. 8; Pet. App. B1011. After a grand jury investigation, petitioner was indicted on various charges, including mail fraud and making false claims to obtain Medicare payments. See C.A. App. 263-272; Pet. App. B1011. Petitioner pleaded guilty, pursuant to a plea agreement, to one count of mail fraud predicated on five false Medicare claims submitted for services purportedly rendered to a single beneficiary.[1] See

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[1] Petitioner also pleaded guilty to, and was convicted of, one count of unlawful distribution of a controlled substance (codeine) in violation of 21 U.S.C. 841(a)(1). C.A. App. 287, 304. As part of the plea agreement, petitioner agreed to surrender his license to practice medicine in New York and to make restitution to beneficiaries. C.A. App. 287-288.

C.A. App. 290-308. The plea agreement provided that "[c]laims of the Medicare program will be determined in a separate civil proceeding and will not be part of the restitution ordered by the Court. The restitution ordered by the Court will be limited to the unreimbursed expenses paid directly by the patients." C.A. App. 288.

3. Under the Civil Monetary Penalties Law, 42 U.S.C. 1320a-7a(a)(1)(A) (CMPL), the Secretary of HHS is authorized to pursue administrative sanctions against a person who knowingly presents a Medicare claim for services that were not provided as claimed. These include the distinct sanctions of a "civil monetary penalty," an "assessment," and exclusion from Medicare and related programs. A "penalty" may be imposed of up to $2,000 for each item or service not provided as claimed, and an "assessment" may be ordered of up to twice the amount claimed for each such item or service—whether or not the claim was actually paid. 42 U.S.C. 1320a-7a(a). Persons subject to civil monetary penalties and assessments may also be excluded from participation in federal and state health care programs. *Ibid.* The Secretary has delegated to the HHS Inspector General (IG) the responsibility for implementing the CMPL. 48 Fed. Reg. 45,306 (1983).

4. The IG initiated a proceeding against petitioner to pursue the claims of the Medicare program reserved in the plea agreement.[2] Petitioner was

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[2] In an independent agency proceeding, petitioner was excluded from Medicare program participation under a statutory mandate that a person convicted of a Medicare-related criminal offense be excluded for at least five years. 42 U.S.C. 1320a-7(a)(1); 42 U.S.C. 1320a-7(c)(3)(B); C.A. App. 687-689.

responsible for presenting nearly 700 false reimbursement claims to Medicare (C.A. App. 2 n.3); the IG sought civil monetary penalties of $425,250, an assessment of $70,648, and a 30-year exclusion from participation in federally funded state health care programs. C.A. App. 168-204. After a hearing, the ALJ issued a decision sustaining the IG's factual allegations, finding that petitioner "described his services one way to induce patients to come to his office for electro-acupuncture treatments and then described what he did another way on the Medicare claims to induce the Medicare carrier to pay for his services." *Id.* at 30.

The HHS Appeals Board affirmed the ALJ's ultimate decision[3] imposing penalties totalling $345,000, assessments totalling $70,648, and an exclusion from Medicare and state health care programs for ten years. C.A. App. 116, 122. In arriving at these sanctions, the ALJ determined that "[p]enalties are appropriate here because the assessments alone cannot compensate the government fully for the harm caused" by petitioner. *Id.* at 116. The measurable damages to the government were found to be $174,000 ($9,000 in Medicare payments to petitioner for false or improper claims plus $165,000 in costs for investigating and preparing to prosecute). *Id.* at 110-111. On this basis the ALJ imposed $345,000 in penalties "to make the government whole for the damages and expenses caused by [petitioner] and to insure that the penalties and assessments are not punitive or

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[3] In his initial decision, the ALJ reduced sanctions sought by the IG. C.A. App. 29-31. The Appeals Board affirmed the ALJ's factual findings, but remanded the case for reconsideration of the sanctions. *Id.* at 63.

counterproductive to [petitioner's] rehabilitation." *Id.* at 117. In affirming these sanctions, the Appeals Board concluded that "there was a reasonable, indeed direct, relationship between the amount of the assessment and penalties imposed and the damages incurred by the government." *Id.* at 122.

5. On petition for review of this final decision to the court of appeals, petitioner raised nine separate arguments. Of these, the court reached and decided favorably to petitioner only one: that the imposition of the penalty amounts—but not the assessments—was precluded by petitioner's understanding of the terms of his plea agreement. Pet. App. B1013-B1015. The court noted that the plea agreement specifically left open the possibility of further administrative proceedings, but held that this unqualified reservation was given a more restrictive meaning by statements at petitioner's plea allocution indicating that the only matter left to be handled in a separate civil proceeding was $190,000 in Medicare *losses*, which the court interpreted to preclude the pursuit of monetary *penalties*. *Id.* at B1013-B1014. Applying a test that looked to the reasonable understanding of the defendant as to the terms of the plea agreement, the court found that petitioner understood that the claims that would be pursued administratively would total no more than $190,000. Accordingly, the court held that the collection of penalties was barred by the plea agreement, and it struck the award of penalties from the HHS decision. *Id.* at B1013-B1015. Without discussing petitioner's other arguments, the court of appeals affirmed HHS's assessment of $70,648 and, implicitly, petitioner's exclusion from Medicare and other programs for ten years. *Id.* at B1015.

6. Petitioner filed an application for attorney's fees of $141,666 and expenses of $6,930 under the Equal Access to Justice Act (EAJA).[4] The government opposed the application, arguing that no fees or expenses were due under EAJA because the government had been substantially justified in its position. The government argued alternatively that, in any event, the amounts claimed should be reduced because, *inter alia*, petitioner was the prevailing party as to only one of the three sanctions he challenged in the court of appeals.[5]

The court of appeals denied the fee application without opinion. Pet. App. A.

ARGUMENT

1. Petitioner suggests that certiorari should be granted in this case "to provide further guidance to federal courts in applying the standard for 'substantial justification.' " Pet. 29. Petitioner concedes (*ibid.*) that *Pierce* v. *Underwood*, 487 U.S. 552 (1988),

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[4] EAJA (28 U.S.C. 2412(d)(1)(A)) provides in relevant part that:

> a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action * * * brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

[5] The government also noted that there was no basis for petitioner's claim that he was entitled to attorney's fees based on the amount of the penalty avoided, that petitioner was not entitled to attorney's fees for his pro se representation of himself during the administrative proceeding, and that he was not entitled to fees for collateral litigation. See Gov't C.A. Opp. to Mot. for Attorney's Fees 23-29.

establishes the test for determining whether the position of the government was substantially justified; he contends only that despite *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990), it remains unclear whether the government's position as a whole must be considered in determining that issue, or whether the court should consider the justification of the government's position issue-by-issue. Even if petitioner were correct that *Jean* is ambiguous,[6] this case would not be an appropriate one in which to resolve that ambiguity, because the government's position was substantially justified under either approach.

Pierce v. *Underwood* establishes that the test to be applied in determining whether the government was substantially justified is whether its position had a "reasonable basis both in law and fact." 487 U.S. at 565. *Pierce* also requires a deferential standard of review of the decision of the court acting on the fee application; absent an abuse of discretion, the decision of that court is to be affirmed. *Id.* at 562-563.

The court of appeals did not abuse its discretion in denying fees, since the government was justified in attempting to recover its losses, direct and indirect, resulting from petitioner's fraudulent claims.[7] This

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[6] *Jean* is not in fact ambiguous. See 496 U.S. at 161-162: "While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items." Petitioner has cited no case decided since *Jean* in which a court of appeals has utilized the issue-by-issue test, and we are aware of none.

[7] The government opposed the award of EAJA fees on the ground that its position on the merits was substantially justified. In denying the application for fees, the court of appeals appar-

is true whether *Jean* requires that the government's position be considered as a whole, or whether it is appropriate to focus only on the justification for the government's position on the issue it lost in the court of appeals.

a. The position of the United States, taken as a whole, was not only justified, it was sustained in substantial part by the court of appeals. The record establishes that petitioner filed hundreds of false Medicare claims over a period of years and that he deliberately structured those claims so as to attempt to avoid detection. On this record, the ALJ concluded that petitioner "submitted claims to Medicare for services which he knew, should have known or had reason to know were not provided as claimed." Pet. App. B1012. The court's decision on the merits did not disturb that factual finding. On the basis of that finding, HHS was under a statutory mandate to attempt to recoup the losses to Medicare and to the government caused by that misconduct. The court of appeals recognized the propriety of the CMPL proceeding—taken as a whole—in affirming the assessments of more than $70,000 and petitioner's exclusion from participation in Medicare and other government medical programs for ten years. *Id.* at B1015. Accordingly, the government's position in this litigation had a reasonable basis in law and fact, and the court of appeals did not abuse its discretion in denying EAJA fees.

b. Even if the focus were directed solely to the one issue on which it did not prevail, instead of to the case

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ently accepted this argument, since the alternative government arguments disputed only the amount of the fees claimed.

as a whole, the government acted reasonably and thus with substantial justification in seeking to recoup its monetary losses by imposing $345,000 in penalties in addition to the assessment and the exclusion.

The written plea agreement that petitioner and the government entered into specifically provided that "[c]laims of the Medicare program will be determined in a separate civil proceeding and will not be part of the restitution ordered by the Court." Pet. App. B1013. The government reasonably argued that, by virtue of this provision, the agreement specifically embraced only restitution to petitioner's patients, and deferred Medicare's claims against petitioner to a separate civil proceeding. Moreover, the government contended, the reserved Medicare claims extended to penalties, as well as assessments and exclusions. In the context of the CMPL, "penalties" and "assessments" are simply different methods for recovering the government's direct and indirect losses. For example, the HHS regulation addressing the amount of penalties and assessments states that "[u]nless there are extraordinary mitigating circumstances, the aggregate amount of the penalty and assessment should never be less than double the approximate amount of damages and costs." 42 C.F.R. 1003.106(c)(3).[8] This regulation reflects the fact that damages to the government cognizable under the CMPL include both the amounts paid directly by the

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[8] In this case, the assessments were $70,648—less than double the improperly claimed reimbursements of $42,875 (C.A. App. 129)—and the penalties were $345,000—approximately double the direct damages to the government from petitioner's conduct (C.A. App. 110-111).

Medicare program and the costs of bringing a respondent to justice.[9]

The court of appeals rejected the government's analysis on the basis of what petitioner "reasonably understood" the agreement to mean, based largely on statements of the United States Attorney and the judge at petitioner's plea allocution. Pet. App. B1013-B1014. Petitioner's "reasonable understanding" of his agreement is a matter as to which reasonable good-faith disagreement is inherently plausible, if not likely. Reasonable differences of interpretation are particularly understandable where, as here, the court relied on statements at plea allocution, outside the confines of the written plea agreement.

The government's position was consistent with the written plea agreement, interpreted in light of the terms and concepts of the CMPL. Under the CMPL, both penalties and assessments are employed to recover "losses," which may include administrative and prosecutorial costs in addition to out-of-pocket payments. The difference in understanding between petitioner and the government as to the terms used in the agreement did not deprive the government's position of consistency and reasonableness. See *Cohen* v. *Bowen*, 837 F.2d 582, 585, 586-587 (2d Cir. 1988) (EAJA claims denied where merits turned on "close" factual issue). The government was therefore

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[9] See *Mayers* v. *HHS*, 806 F.2d 995, 999 (11th Cir. 1986) (sustaining assessment and civil penalty totalling $1,791,100 where the claims amounted to $145,550), cert. denied, 484 U.S. 822 (1987); *Bernstein* v. *Sullivan*, 914 F.2d 1395, 1397 (10th Cir. 1990) ("[t]he purpose behind the CMPL is to make the government whole for monies paid on fraudulent submissions and the cost of investigating such fraudulent submissions").

reasonable, and accordingly substantially justified, in taking the position that penalties were not precluded by the plea agreement.

2. Petitioner incorrectly suggests (Pet. 34-42) that this case presents an appropriate vehicle for clarifying the "prevailing party" standard used in EAJA. Even assuming that a court of appeals decision unaccompanied by an opinion discussing that issue might in some circumstances provide such a vehicle, this case does not do so. The court of appeals refused to award any EAJA fees at all, despite the government's concession that petitioner, as the prevailing party on the penalties issue, was entitled to a reduced fee award if the court believed that the government's position was not substantially justified. It is therefore clear that the court of appeals' decision did not reach the prevailing party issue petitioner asks this Court to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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